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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715, AFL-CIO, Plaintiff and Appellant, v. CUPERTINO UNION SCHOOL DISTRICT et al., Defendants and Respondents.	H028164 (Santa Clara County Super.Ct.No. CV-024058)

This case presents the issue of whether the right to arbitrate is waived when a timely but procedurally defective demand for arbitration is made. Our resolution of the dispute requires us to consider a clash between important public policies. On the one hand, where the arbitration agreement specifies a time limit for making a demand, courts should uphold the parties' bargain by finding a waiver of the right to arbitrate where the demand is untimely: "[U]nless legally excused, a contracting party cannot compel arbitration when it has failed to make a timely demand." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 310-311 (*Platt*).) On the other hand, arbitration is strongly favored under California law, claims of arbitration waiver are closely scrutinized, and the party claiming such waiver bears a heavy proof burden. (*Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*Saint Agnes*).)

Service Employees International Union, Local 715, AFL-CIO (Union) pursued a grievance with the Cupertino Union School District (District) through multiple steps

required under their collective bargaining agreement (CBA). When the grievance was not resolved to its satisfaction, Union submitted to District two letters—the first being Union's expressed intent to arbitrate the matter in the future once the grievance had been formally denied, and the second being a clear demand for arbitration from Union's attorney. Both letters were timely under the CBA but neither complied with its procedural requirements (i.e., transmission of notice to a state mediation service). Accordingly, District refused to arbitrate, contending that Union had waived its arbitration rights,[1] and that the grievance was deemed "settled" under the terms of the CBA. Union petitioned the court below to compel arbitration. The court, however, agreed with District that Union forfeited its arbitration rights by failing to submit a timely demand that complied with the procedure outlined in the CBA.

On appeal, we examine the nature and extent of Union's failure to comply with the CBA's arbitration demand requirements and whether a proper application of the holding in *Platt*, *supra*, 6 Cal.4th 307, compels the conclusion that Union forfeited the right to arbitrate the instant grievance. We conclude that *Platt* and the cases it relied upon are not controlling and that Union did not forfeit its arbitration rights by submitting a timely but procedurally defective demand. We therefore reverse the order denying the petition to compel arbitration.

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[1] Use of the term "waiver" in the context of the waiver of arbitration rights does not necessarily mean that the party has intentionally relinquished such rights. As our Supreme Court has explained, decisions concerning loss of arbitration rights "use the word 'waiver' in the sense of the loss or forfeiture of a right resulting from failure to perform a required act." (*Platt*, *supra*, 6 Cal.4th at p. 315; see also *Saint Agnes*, *supra*, 31 Cal.4th at p. 1201 [holding that waiver of arbitration rights through the party's conduct is determined by " 'whether a party's filing of a lawsuit in the face of an agreement to arbitrate was conduct so inconsistent with the exercise of the right to arbitration as to constitute an abandonment of that right' "].) We use the terms "waive" and "forfeit" interchangeably herein to refer to the loss of a party's arbitration rights.

FACTS[2]

On or about January 30, 2002, Union and District entered into a written agreement, the CBA. A dispute arose between the parties that resulted in a written grievance being filed on December 10, 2003, by Union member Gavin Ward. The grievant claimed that District had used on-call workers to perform certain tasks in violation of certain "contracting out language #1" of a side letter, and sought "[r]eimbursement of lost wages to all affected workers." On December 17, 2003, District issued its written "Informal Level Decision" denying the grievance. On January 5, 2004, Ward and Union submitted another written grievance that was substantively the same as the prior grievance. District again denied the grievance in writing on January 8, 2004; the letter, sent by District's human resources manager, Terry Nolan, was addressed to Ward, and included three Union representatives as "cc" recipients.

On January 20, 2004, Union representative Leah Berlanga—who was among those listed as having received a copy of District's January 8, 2004 letter—wrote to District (Nolan), indicating that she was following up on the parties' last meeting concerning the grievance and was amending the grievance (to claim the challenged action violated the CBA as well as the side letter). The letter stated further that Union intended to arbitrate the grievance, and that it would make a request for arbitration to the State Conciliation Services (SCS) after receiving District's final decision. Berlanga delivered this letter to Nolan on January 21, 2004; at the same time, Nolan told Berlanga that she had previously sent District's response to the grievance on January 8, 2004, and Nolan handed Berlanga another copy of that January 8 response.

On February 10, 2004, District received a letter (dated February 9, 2004) from attorney W. Daniel Boone concerning the grievance, stating: "This firm represents the

[2] To avoid repetition, certain CBA provisions and a detailed discussion of Union's attempts to arbitrate the grievance are found in part IV of the Discussion, *post*.

Union in the above matter. This is a formal request for arbitration." The letter went on to propose three potential arbitrators and indicated that Union would "seek all appropriate legal remedies" if District refused to arbitrate. On February 11, 2004, Nolan advised Berlanga orally that Union's arbitration request "was improper and untimely." Similarly, on February 13, 2004, attorney Gregory J. Dannis, on behalf of District, advised Boone in writing that District did not acknowledge Boone's February 10 letter as being a proper arbitration request; he noted further that Union had not, as of February 13, 2004, "submitted the required letter to [SCS] in this matter."

On March 10, 2004, Boone, on behalf of Union, wrote to SCS, requesting a list of arbitrators to resolve the grievance under the CBA. On April 2, 2004, Dannis again wrote Boone to advise that it was District's position that Union had not submitted a timely arbitration request. Dannis noted that, pursuant to the terms of the CBA, District considered the matter "settled" based upon its January 8, 2004 denial of the grievance and would not agree to participate in an arbitration that was based on Union's untimely request.

PROCEDURAL HISTORY

On July 28, 2004, Union filed its petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2.[3] District opposed the petition, arguing both that the grievance was not substantively arbitrable, and that Union had failed to make a timely demand for arbitration under the terms of the CBA.

The petition was heard and denied by the court on September 21, 2004. The trial court concluded that, while the grievance was a matter that was subject to arbitration, the petition to compel should be denied because of its untimeliness: "The Court finds that

[3] The petition named District, as well as District's board of education, as respondents. As the parties make no distinction between the two respondents, we make reference herein only to District, the contracting party.

the failure of [Union] to timely demand arbitration without sufficient excuse constitute[d] a waiver of the right to arbitrate. The contract states that [if] the matter is not arbitrated it is deemed settled. [District is] entitled to stand under the rights given to [it] under the negotiated agreement."

Union filed timely its notice of appeal on November 19, 2003. The order denying Union's petition to compel arbitration is directly appealable. (See Code Civ. Proc., § 1294 ["aggrieved party may appeal from: [¶] (a) An order dismissing or denying a petition to compel arbitration"]; see also *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349.)

DISCUSSION

I. *Standard Of Review*

The trial court's determination that a petition to compel arbitration should be denied on the ground that the petitioner has waived its right to arbitrate (under Code Civ. Proc., § 1281.2, subd. (a)) "is ordinarily a question of fact and determination of this question, if supported by substantial evidence, is binding on an appellate court. [Citation.]" (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 185.) Although waiver and estoppel findings are typically factual, "[w]hen, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling." (*Platt, supra*, 6 Cal.4th 307, 319.)

In this instance, the facts relevant to the trial court's finding that Union waived its right to arbitrate the grievance were undisputed. We therefore review the court's finding de novo and are not bound by its ruling.

II. *Issue On Appeal*

The sole issue on appeal is whether the court properly concluded that Union had waived its right to arbitrate the grievance because of its failure to make a timely demand for arbitration under the terms of the CBA.

Union argues that under *Napa Association of Public Employees v. County of Napa* (1979) 98 Cal.App.3d 263, 271 (*Napa Association*), a finding of arbitration waiver is improper unless there is, in addition to an untimely demand, "an allegation and proof of intentional abandonment of the right to arbitrate or substantial prejudice resulting from the delay." As neither circumstance was presented here (Union argues), the court erred in finding that Union had waived its right to arbitrate the grievance.[4]

District responds that *Napa Association* is inapplicable because it concerned the procedural timeliness of initiation of a grievance procedure, not of making an arbitration demand. District argues that under *Platt*, *supra*, 6 Cal.4th 307—a case that was not cited in the proceedings below—Union clearly forfeited its arbitration rights by failing to make a timely arbitration demand under the terms of the CBA.[5] Following a brief discussion of applicable arbitration law, we discuss the parties' contentions and resolve the controversy concerning whether Union forfeited its right to arbitrate the instant grievance.

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[4] Union also contends (citing *Napa Association*) that the question of whether its arbitration demand "was procedurally sufficient under the [CBA]" is a matter for determination by the arbitrator rather than the courts. We summarily reject that assertion. As the court noted in *Napa Association*, in instances where the collective bargaining agreement involves a governmental employer excluded under the National Labor Relations Act (29 U.S.C. § 151 et seq.)—as is the case here—federal law making arbitration waiver a decision for the arbitrator is inapplicable, and "the question of waiver [is] a matter for judicial determination." (*Napa Association*, *supra*, 98 Cal.App.3d at p. 268; see also *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 264, fn. 5.)

[5] District argued below that the grievance was not a proper subject for arbitration because it concerned an alleged violation of a side letter, not of the CBA itself. District does not renew this argument on appeal; rather, it claims simply that the trial court correctly found that Union forfeited its right to arbitrate the matter. We therefore deem District to have forfeited any argument that the grievance was not a proper subject for arbitration. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 9, fn. 1.)

III. *Contractual Arbitration*

Under California law, a party to an agreement requiring resolution of disputes through arbitration may seek a court order enforcing its contractual arbitration rights. "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement." (Code Civ. Proc., § 1281.2.)

Thus, a petition to compel under Code of Civil Procedure section 1281.2 essentially seeks specific performance of an arbitration agreement. (See *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 479 (*Freeman*).) In deciding such petition, the court "determine[s] in advance whether there is a duty to arbitrate the controversy. [Citation.] This determination 'necessarily requires the court to examine and, to a limited extent, construe the underlying agreement.' [Citation.]" (*Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 69.)

Where the agreement to arbitrate does not specify a time for demanding arbitration, the demand must be made within a reasonable time to avoid forfeiture of the arbitration right. (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1043; *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1099.) Where, however, "the parties have agreed that a demand for arbitration must be made within a certain time, that demand is a condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises." (*Platt, supra,* 6 Cal.4th at pp. 313-314.)

IV. *Terms Of CBA And Union's Purported Arbitration Demands*

This case turns on article 12 of the CBA—a four and one-half page portion of the agreement entitled "Grievance Procedure." The CBA describes two stages of the formal

grievance process that a grievant must follow to attempt to resolve the dispute through dialogue with District. Immediately following two sections of the CBA concerning the formal grievance procedure,[6] section 12.6 of the CBA (entitled "Arbitration – Step 3") reads in part as follows: "Selection of the Arbitrator. If the Union is not satisfied with the disposition of the grievance at Step 2, the Union may submit the grievance to arbitration within twenty (20) working days from the receipt of the Superintendent's decision, by submitting a letter to the State Conciliation Service (SCS) requesting a list of arbitrators, with a copy to the Superintendent." That section provides further that "[t]he function of the arbitrator shall be to hold a hearing concerning the grievance and to render a decision on the issues presented by the parties. Such decision will be binding on all parties."

A separate section of article 12 of the CBA (entitled "General Provisions") includes the following: "[¶] c. The time allowance set forth in this grievance procedure may be extended by mutual agreement of the grievant or the grievant's representative and the District. [¶] d. Any grievance not appealed to the next step of the procedure within the prescribed time limits shall be considered settled on the basis of the answer given in the preceding step."

In this instance, Union acknowledges that it did not make a written request to SCS for a list of arbitrators within 20 working days of receipt of the Superintendent's decision on "step 2" of the grievance procedure. It is undisputed that Union's request for arbitration to SCS in this form did not occur until March 10, 2004. Union, however, claims that it submitted *two* timely arbitration demands (that were, admittedly, not sent to

[6] The two stages of the formal grievance process are described in the CBA in section 12.4 (entitled "Formal Written Procedure – Step 1"), and in section 12.5 (entitled "Formal Written Procedure – Step 2"). As District does not contend that Union failed to comply with any of the formal grievance procedures delineated in the CBA, we need not detail those sections here.

SCS): (1) the January 20, 2004 letter from Union representative Berlanga; and (2) the February 9, 2004 letter from Union attorney Boone. We conclude that only the second letter constituted a timely (but procedurally improper) arbitration demand.

Both letters were timely under the CBA. Union's January 20, 2004 letter was plainly within 20 working days of receipt of District's final response to the grievance, which response was made on January 8, 2004. Since the time period for submitting a demand commences on *receipt* of District's final response to the grievance, and District stipulated that Union "had until February 12, 2004 to submit a request for arbitration," Boone's February 9, 2004 letter to District was also submitted in a timely fashion.[7]

Berlanga's January 20, 2004 letter, however, was not an unequivocal demand for arbitration. It read, in relevant part: "The intent of this letter is to reiterate the position of [Union] which is to take this Grievance to arbitration. Please review the Grievance attached which has been amended . . . . Upon receiving your letter [rejecting the grievance], I will forward our request for arbitration to [SCS] to request a list of Arbitrators." Rather than an unequivocal demand for arbitration, the letter expressed Union's *then-present intention* to seek arbitration *at a date in the future*. Thus—putting aside the fact that the letter was not sent to SCS—it was not an effective arbitration demand. (See 1 Corbin on Contracts (Rev. ed. 1993) § 1.15, p. 41 ["statement of

[7] We reject Union's contention that it did not "receive" District's rejection of the grievance (dated January 8, 2004) until January 21, 2004. That assertion has no evidentiary support and, in any event, is not germane to the resolution of this case. Union presented *no* competent evidence to rebut District's showing that three Union representatives received copies of the letter through the mail. (See Evid. Code, § 641 ["letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail"].) Further, the trial court apparently gave little credence to Union's claim that it did not receive District's January 8, 2004 letter until 13 days later, describing it as "a claim belied by the facts." Because District agrees that Union's contractual deadline for demanding arbitration was February 12, 2004, Boone's letter to District was made within the time stated in the CBA to request arbitration.

intention is the mere expression of a state of mind, put in such a form as neither to invite nor to justify action in reliance by another person"]; *Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1562-1563 [letter outlining terms to appear in contemplated future written contract was "agreement to agree"]; *Western Homes v. Herbert Ketell, Inc.* (1965) 236 Cal.App.2d 142, 144, 145 [agreement reflecting that parties "contemplated" hiring third party to manage project constituted "an expectation or intention rather than a promise or undertaking," and was thus not a contractual obligation].)

Boone's February 9, 2004 letter to District contained no such equivocation or expression of future intentions. It stated: "This is a formal request for arbitration." We thus conclude that Boone's letter was a clear expression of Union's intent to arbitrate the grievance. In the next section, we address whether the timely (but procedurally improper) submission of Union's intention to arbitrate embodied in this February 9, 2004 letter precludes a finding that Union waived arbitration.

V. *Whether Union Waived Arbitration Rights*

We now consider (1) whether *Napa Association*, *supra*, 98 Cal.App.3d 263, supports Union's contention that it did not waive its right to arbitrate, and (2) whether, conversely, *Platt*, *supra*, 6 Cal.4th 307, compels affirmance of the court's denial of Union's petition to compel arbitration. We conclude that, based upon the particular facts presented here involving Union's timely-but-imperfect arbitration demand, neither case is dispositive. We then address rules of contract interpretation and public policy favoring arbitration that guide our decision.

A. *Applicability of Napa Association and Platt*

In *Napa Association*, the court addressed the denial of a labor union's petition to compel arbitration after the public entity had refused to consider or arbitrate the union's

grievances on the basis that the grievances were untimely.[8] (*Napa Association, supra*, 98 Cal.App.3d at pp. 267-268.) The appellate court reversed, concluding that it was error to find arbitration waiver as a matter of law because of the union's alleged failure to timely file a grievance: "All we hold is that the mere assertion of a party's failure to file a grievance within the time specified in the agreement, in the absence of an allegation and proof of intentional abandonment of the right to arbitrate or substantial prejudice resulting from the delay, is not of itself sufficient to raise a question of 'waiver' within the meaning of [Code of Civil Procedure section 1281.2], and that the trial court therefore erred in finding waiver as a matter of law." (*Id.* at p. 271, fn. omitted.)

Napa Association is plainly distinguishable. As the Supreme Court has explained, "*Napa Association* involved the timeliness of submitting a labor grievance, not a demand for arbitration." (*Platt, supra*, 6 Cal.4th at pp. 316.) Indeed, the *Napa Association* court made clear the distinction between "a contractual 'statute of limitations' with respect to the time within which *arbitration* must be demanded"—that was not present there—and the issue that the appellate court was deciding, namely, "a time schedule with respect to the filing and processing of *grievances*." (*Napa Association, supra*, 98 Cal.App.3d at p. 270, original italics; see also *Platt, supra*, at pp. 316-317 [emphasizing that *Napa Association* did not involve question of arbitration demand's timeliness].)

Here, there is no issue concerning the timeliness of Union's filing of the grievance; the sole question is the timeliness of its arbitration demand. *Napa Association* plainly has no application to this case. Moreover, to the extent that Union attempts to

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[8] The memorandum of understanding between the parties required that the grievant discuss the grievance with the immediate supervisor within 10 working days from the time that the occurrence on which the grievance was based took place or from the time the grievant would have been reasonably expected to know of the occurrence. (*Napa Association, supra*, 98 Cal.App.3d at p. 267.) The entity claimed that the union's grievance was untimely because it was filed nearly two months after the entity's decision that it contended was the "occurrence." (*Ibid.*)

export *Napa Association*'s holding concerning waiver in the context of filing an untimely grievance to the entirely different issue of an untimely arbitration demand, the Supreme Court in *Platt* expressly rejected that argument: "In holding that the failure to timely submit a labor grievance was not a 'waiver' of the right to arbitrate in the absence of intentional relinquishment of the right or substantial prejudice, the court in *Napa Association* emphasized that its decision was limited to the grievance issue. . . . [Citations.] Therefore, there was no reason for the court in [*Napa Association*], to address the consequences of failing to make a timely demand for arbitration." (*Platt, supra,* 6 Cal.4th at p. 317.)

We also disagree with District that *Platt, supra,* 6 Cal.4th 307, requires us to conclude that Union waived its arbitration rights. The facts presented in *Platt*, as contrasted with the facts here, are important to consider. There, the parties entered into an arbitration agreement following nearly five years of construction litigation. (*Id.* at p. 311.) The agreement contemplated that they would participate in a voluntary settlement conference before a retired judge, and that they would arbitrate the matter if the efforts at the settlement conference proved unsuccessful. (*Ibid.*) The agreement provided further that the parties would jointly demand arbitration no later than August 10, 1989, and that either party could file its own demand for arbitration if the other failed to cooperate, stipulating " '*but in no event shall such a demand be filed later than August 31, 1989.*' " (*Ibid.*, original italics.) The plaintiffs waited until nearly two months after that deadline (October 30, 1989) to file an arbitration demand with the American Arbitration Association (AAA). (*Id.* at p. 312.) When the AAA declined to proceed with arbitration absent a court order, the plaintiffs filed a petition to compel arbitration. (*Ibid.*)

The superior court denied the petition because the plaintiffs had not sought arbitration within the time specified by the agreement, and the Court of Appeal affirmed. (*Platt, supra,* 6 Cal.4th at p. 312.) The Supreme Court affirmed as well, holding: "When, as here, the parties have agreed that a demand for arbitration must be made

within a certain time, that demand is a condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises." (*Id.* at pp. 313-314.) The high court concluded: "Consistent with established law, we hold that, in the absence of legal excuse, a party's failure to timely demand arbitration results in a contractual forfeiture of the right to compel arbitration." (*Id.* at pp. 318-319.)

Platt is distinguishable on at least two bases. First, the plaintiffs in *Platt* made *no attempt whatsoever* to meet the contractual deadline for demanding arbitration. Instead, they submitted their demand nearly two months late. (*Platt*, *supra*, 6 Cal.4th at p. 312.)[9] In contrast, Union here—through the February 9, 2004 letter of its attorney—made a timely and unequivocal demand for arbitration. That demand clearly apprised District within the 20-working-days notice period specified in section 12.6 of the CBA that Union wanted to arbitrate the grievance.

Second, the contractual language in *Platt* established a clear condition precedent that arbitration be required only in the event of a timely demand. The requirement that the arbitration demand be made "*in no event . . . later than August 31, 1989*" (*Platt*, *supra*, 6 Cal.4th at p. 311, original italics), stands in stark contrast with the permissive language here that "Union may submit the grievance to arbitration within" 20 working days of receipt of District's decision concerning the grievance.[10]

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[9] Unlike the case before us, there was significant evidence in *Platt* that the August 31, 1989 "drop dead" date for demanding arbitration was a specific, bargained-for term of the agreement. The litigation that spawned the arbitration agreement had been pending for nearly five years (*Platt*, *supra*, 6 Cal.4th at p. 311), and, as part of the negotiations concerning the proposed language for the agreement, one of the defendants had "requested a 'cut-off date so that this action would not drag on ad infinitum and would finally be concluded after a long delay.' " (*Id.* at pp. 311-312.)

[10] The cases cited in *Platt*, *supra*, 6 Cal.4th at p. 313, for the principle that the " 'failure to make demand within [the time specified in the contract] constitutes a waiver of the right to arbitrate,' " are likewise distinguishable. In *Jordan v. Friedman* (1946) 72 Cal.App.2d 726, the contract required that the arbitration demand be made within a reasonable time but " 'in no case later than the time of final payment.' " (*Id.* at p. 727.)

In short, we reject equally Union's claim that *Napa Association, supra*, 98 Cal.App.3d 263, compels reversal, and District's assertion that *Platt, supra*, 6 Cal.4th 307, requires affirmance of the order denying the petition to compel arbitration.

B. *Contract Interpretation and Policy Favoring Arbitration*

Our conclusion that this case is distinguishable from *Platt, supra*, 6 Cal.4th 307, finds support in traditional rules of contract interpretation as well as in familiar policy considerations (discussed, *post*). It is a well established principle that conditions precedent "are not favored by the law, and are to be strictly construed against one seeking to avail himself of them. [Citations.]" (*Antonelle v. Lumber Co.* (1903) 140 Cal. 309, 315; see also *Pacific Allied v. Century Steel Products, Inc.* (1958) 162 Cal.App.2d 70, 79-80.) Thus, "stipulations in an agreement are not to be construed as conditions precedent

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The plaintiff did not demand arbitration until nearly three months after the final payment was due. (*Ibid.*) Accordingly, the court concluded that the plaintiff's failure to make demand within the time specified in the contract constituted a waiver of his right to arbitration. (*Ibid.*) In contrast to the case here, the court in *Jordan* was not faced with a situation where (a) the contractual language concerning the time for making an arbitration demand was permissive; or (b) the plaintiff made a demand that was timely but did not follow the specific procedure of the contract. Similarly, *Freeman, supra*, 14 Cal.3d 473, is inapposite. There, the court addressed whether the plaintiff waived arbitration under the uninsured motorist clause of his insurance contract by failing to make demand within one year as then required under Insurance Code section 11580.2, subdivision (i). (*Freeman, supra,* at p. 486.) Thus, *Freeman* also involved a total failure to make a timely arbitration demand, as well as the application of a statute of limitations which had plainly run; it did not consider a situation (as here) involving a timely but procedurally improper arbitration demand. Likewise, *Butchers Union v. Farmers Markets* (1977) 67 Cal.App.3d 905 (*Butchers Union*), is distinguishable. Although the trial court denied a labor union's petition to compel arbitration because of an asserted waiver, the appellate court reversed. It held that the timeliness of the union's arbitration request was a matter to be decided by the arbitrator (*id.* at pp. 908, 913); because the subject collective bargaining agreement affected interstate commerce within the meaning of section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185) (*Butchers Union, supra,* at p. 908), federal law was applicable and required that procedural arbitrability questions be decided by the arbitrator. (*Id.* at p. 910.) No such issue is presented here. (See fn. 4, *ante*.)

unless such construction is required by clear, unambiguous language; and particularly so where a forfeiture would be involved or inequitable consequences would result. [Citations.]" (*Alpha Beta Food Markets v. Retail Clerks* (1955) 45 Cal.2d 764, 771 (*Alpha Beta Food*); see also *Rubin v. Fuchs* (1969) 1 Cal.3d 50, 53.)

Further, the Civil Code requires that "[a] condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." (Civ. Code, § 1442.)[11] Thus, " '[f]orfeitures are not favored by the courts, and if an agreement can be reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it. The burden is upon the party claiming a forfeiture to show that such was the unmistakable intention of the instrument. [Citations.] "A contract is not to be construed to provide a forfeiture unless no other interpretation is reasonably possible." [Citations.]' " (*Universal Sales Corp. v. Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 771 (*Universal Sales*), quoting *Nelson v. Schoettgen* (1934) 1 Cal.App.2d 418, 423; see also *Lowe v. Ruhlman* (1945) 67 Cal.App.2d 828, 832.)

For instance, in *Universal Sales*, *supra*, 20 Cal.2d 751, our Supreme Court considered whether a particular provision in a contract for the purchase and sale of a certain machine provided for a forfeiture of the buyer's rights to royalties derived from the sale of other similar machines. The seller argued that a provision[12] that relieved the buyer of the obligation to pay for the machine if it did not prove functional and limited

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[11] Cf. Civil Code section 3275 (providing that the court may, where appropriate, grant a party relief from a forfeiture resulting from noncompliance with the provisions of an obligation upon making full compensation to the other party).

[12] The provision in question read: " '*In the event that said machine shall not operate properly or with sufficient capacity*, [buyer] shall be under no obligation to pay for same, but [seller] shall not be liable for consequential damages, and *the liability of [seller] shall be exclusively limited to accepting from [buyer] the return of said machine and refund payments made thereon.*' " (*Universal Sales*, *supra*, 20 Cal.2d at p. 770, original italics.)

the seller's liability to a refund of the purchase price—upon the buyer's tender of the machine and demand for a refund—operated as a termination of the contract, including a forfeiture of the buyer's right to any royalties from the sale of other machines. (*Universal Sales, supra*, 20 Cal.2d at p. 770.) The court rejected this argument, noting that forfeitures are disfavored (*id.* at p. 771), that the agreement provided in a subsequent clause that it was to remain in effect for 17 years (*id.* at p. 770), and concluding: "If by this language specifically restricted to the measure of the [seller's] liability upon the [buyer's] return of the machine, the parties contemplated a stipulation for termination of the contract, necessarily involving the forfeiture of the [buyer's] rights thereunder, it would have been a simple matter to have so provided in plain terms." (*Ibid.*)[13]

Here, similarly, the CBA did not directly and specifically condition Union's ability to arbitrate a grievance upon it making a timely and procedurally proper demand. As we have noted, the 20-working-days-notice provision in section 12.6(a) of the CBA did not contain words of limitation, such as "in no event" or "subject to," that would have made it clear that the failure to demand arbitration as provided in that section would result in a waiver of arbitration rights. It is only by resort to a different section—section 12.7(d), found on a different page of the CBA—that, through liberal interpretation favoring District, we might construe the failure to give proper notice as resulting in a

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[13] Courts have similarly refused to find the existence of conditions precedent where the contractual language did not clearly compel such conclusion. (See, e.g., *Alpha Beta Food, supra*, 45 Cal.2d at p. 772 [if parties to collective bargaining agreement "had intended that in the event the arbitration award was made at a time when wage board approval was required and that such approval should be a condition precedent to effectiveness, they could have expressly specified that *only* if so approved, would the award become effective"]; *In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174, 1181 [attorney approval held to not be condition precedent to effectiveness of settlement agreement, where, although agreement contained signature lines for attorneys' approval as to form, body of agreement contained no language indicating it was " 'subject to' or 'conditioned on' attorney approval"].)

waiver of Union's arbitration rights. Such a finding would stand the rules of interpretation on their head; we are required to strictly construe the purported condition precedent *against District* (i.e., the one seeking to avail itself of the condition). (*Antonelle v. Lumber Co.*, *supra*, 140 Cal. at p. 315.) Furthermore, we are compelled to reject the existence of a claimed condition that would result in forfeiture unless there appears "clear, unambiguous language" creating such condition (*Alpha Beta Food*, *supra*, 45 Cal.2d at p. 771), a circumstance not present here.

Moreover, in this instance, were we to ignore settled rules of construction by liberally interpreting the CBA in District's favor to find the existence of a condition, the result would be a substantial forfeiture. By so applying section 12.7(d) to preclude arbitration, the grievance would be deemed to have been "settled" in favor of the District based upon its last-stated rejection of the matter. Thus—unlike many arbitration waiver cases, where the upshot of a finding of waiver is that the party seeking arbitration must litigate its dispute[14]—Union (were arbitration waiver found) would be left with *no recourse whatsoever* for resolution of the grievance by a neutral party. We conclude that forfeiture of arbitration rights as a result of failing to make a demand that was both timely and procedurally proper was plainly *not* " 'the unmistakable intention' " of the CBA. (*Universal Sales*, *supra*, 20 Cal.2d at p. 771.) Borrowing from the reasoning in *Universal Sales*, had District and Union "contemplated a stipulation for [the forfeiture of Union's arbitration rights in the event it failed to completely follow the procedure for demanding arbitration in section 12.6(a) of the CBA], it would have been a simple matter to have so

[14] See, e.g., *Berman v. Health Net* (2000) 80 Cal.App.4th 1359; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220.

provided in plain terms." (*Id.* at p. 770.) We construe the relevant provisions of the CBA under Civil Code section 1442 to avoid such forfeiture.[15]

Our conclusion here that the CBA must be construed in a manner that does not effect a forfeiture of arbitration rights underscores our "state's strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. [Citations.]" (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322.) A subset is "the 'strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration.' [Citations.]" (*Doers v. Golden Gate Bridge etc. Dist.*, *supra*, 23 Cal.3d 180, 189; cf *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, 549 ["preference of national labor policy

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[15] We note that, were we to have concluded that a timely and procedurally proper demand was a condition precedent to arbitration under the CBA, this may then have been an appropriate case to grant relief from Union's timely but procedurally improper demand under the "disproportionate forfeiture" doctrine in section 229 of the Restatement Second of Contracts: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its condition was a material part of the agreed exchange." (See also 2 Farnsworth on Contracts (2d ed. 2001) § 8.7.) Under this doctrine, conditions that may be considered immaterial are those "which may be thought of as procedural or technical, or . . . conditions which merely relate to the time or manner of the return performance or provide for the giving of notice or the supplying of proofs." (Rest.2d Contracts, § 84 com. d, p. 219.) Whether a forfeiture is found to be "disproportionate" involves a weighing of "the extent of the forfeiture by the obligee against the importance to the obligor of the risk from which he sought to be protected and the degree to which that protection will be lost if the non-occurrence of the condition is excused to the extent required to prevent forfeiture." (Rest.2d Contracts, § 229, com. b, p. 185.) Here, in balancing the forfeiture of arbitration rights against the degree to which District would lose any protections under the CBA's procedure for demanding arbitration, a court might readily conclude that the forfeiture would be disproportionate. (See Stipanowich, *Of "Procedural Arbitrability": The Effect of Noncompliance with Contract Claims Procedures* (1989) 40 S.C. L.Rev. 847, 880-881 [recommending relief from forfeiture of arbitration due to missed contractual deadlines where extent of noncompliance with demand procedure is minimal].) Again, however, since we conclude here that there was no condition precedent, the potential application of the disproportionate forfeiture doctrine is unnecessary to our resolution of this case.

for arbitration as a substitute for tests of strength between contending forces"].) Consistent with this preference for arbitration, although arbitration rights may be waived, waiver is not easily found. "State law . . . reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. [Citation.] Although a court may deny a petition to compel arbitration on the ground of waiver [citation], waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof. [Citations.]" (*Saint Agnes*, *supra*, 31 Cal.4th 1187, 1195; see also *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782; see also *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1157 [as forfeitures of contractual rights are disfavored and arbitration is favored, "as with waiver, the burden of proof is on the party asserting forfeiture and must be demonstrated by clear and convincing evidence"].)

Our conclusion here that the language of the CBA did not create as a condition precedent to arbitration a timely and procedurally proper demand both promotes these policies favoring arbitration, and is consistent with the holding in *Platt*, *supra*, 6 Cal.4th 307, where the operative agreement required a timely arbitration demand as a clear condition precedent. A contrary conclusion would be (1) inconsistent with the above rules of construction, (2) antithetical to California's preference for arbitration, and (3) opposed to the "well settled policy favoring resolution of disputes on their merits." (*Laguna Village, Inc. v. Laborers' Internat. Union of North America* (1983) 35 Cal.3d 174, 181.)

DISPOSITION

The only conclusion that we may draw from the undisputed facts presented below is that Union did not waive its right to arbitrate the grievance. Accordingly, the order denying Union's petition to compel arbitration is reversed.

Duffy, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.

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Trial Judge:	Hon. Socrates Manoukian
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